

Comments on HB 4158

Josh Ard. J.D., M.B.A., Ph.D.
Law Office of Josh Ard PLLC
Testimony, February 15, 2011

My name is Josh Ard. I am a former chair of both the Consumer Law and the Elder Law and Disability Rights sections of the State Bar of Michigan. I only speak for the Consumer Law Section Council today, which unanimously voted to oppose this bill as written. I need to say that I do not speak for the State Bar as a whole, which I believe is constitutionally forbidden from taking any position on this legislation.

I oppose the bill as written, but hope a reasonable alternative could be developed.

The bill fails to require any display of prices at all, especially in a form that human beings can read

I feel like the child in Hans Christian Andersen's story, "The Emperor's New Clothes." Everybody is saying that they see things in this bill that just aren't there. This has been ignored and no one has spoken the obvious truth.

The sponsor, in her testimony before this committee two weeks ago, said: I want to be clear: this bill is NOT an all-out repeal; it simply brings Michigan into the 21st century by allowing retailers to use the latest technology to clearly and effectively communicate the price of items to consumers. My bill removes the antiquated requirement that a pricer stick be affixed to every item in the store. I am very proud to tell you that this bill also includes consumer protections Michigan families have come to expect and, frankly, deserve.

This bill requires retailers to tell the customer the prices of every item in the store.

From what I could tell by reviewing the testimony of other witnesses, everybody seemed to see a requirement that prices must be displayed, **but it simply isn't there.**

The Michigan Retailers Association testified:

The Act strengthens requirements that retailers display the price of every single item in the store

There is nothing in the act that says that there must be a display of prices, especially not in a form that human beings can read. The bill repeals section 3 of the existing act, where the first subsection has such a requirement.

(1) The total price of a consumer item displayed or offered for sale at retail shall be clearly and conspicuously indicated in arabic numerals, so as to be readable and understandable by visual inspection, and shall

be stamped upon or affixed to the consumer item. If the consumer item is in a package or container, the total price shall be stamped upon or affixed to the outside surface of the package or container and need not be placed directly upon the consumer item. MCL § 445.353.

There is nothing in the proposed bill that requires any display at all. In fact, the bill would create a perverse disincentive from providing such a display. Consider section 6, the section that sets the conditions for liability. It clearly states that one requirement for liability is

There is a price displayed for the consumer item. Section 6(1)(a).

Displayed is defined a bit further down

As used in this section, a price is “displayed” for a consumer item if the price is stamped, affixed, or otherwise marked on the consumer item or the price of the consumer item is displayed by signage, in a current advertisement, by an electronic reader, or by any other method that conveys the current price of the consumer item to the consumer.

Section 6(5).

Nothing says that there must be a display or that the method be one that conveys the current price to the consumer. If an electronic reader can read it, that’s good enough. Most of us cannot pick up a bar code or a RF tag and get any information from it at all.

I would imagine that some libertarians believe that governments shouldn’t be telling retailers what they have to display in their stores, but I doubt that any of them would advocate governmental policies that discourage providing clear information. I can easily see some consultants telling retailers that the best way to avoid liability is to avoid giving clear information.

Shoppers are deterred if they cannot get clear information

I certainly am. I recall once while I was vacationing in Florida I was in a retail store. I was thinking about buying something—I no longer remember what it was—but there was nothing on the item, on the shelf, or anywhere near by that indicated the cost. There was nobody nearby to ask. I realize that I could have searched somebody out and gotten the information, but it wasn’t worth it at the time. The store lost a potential sale.

Complicating the shopping experience will harm retail sales

Michigan retailers do not face competition from China or India. The completion comes from Seattle, where Amazon is based, and other internet retailers. We are busy. We want to get the information we need quickly. If I am on a web site and don’t see what I need, I can get off of it without expending much time or effort. It is rather different if I have taken the time to drive to a retail store. If I become frustrated, it’s easy enough for me to purchase whatever I need, including groceries, on line. The real threat to Michigan retailers is not the minimum costs of providing information or the threat of loss from penalties from scanner errors, but from competition from virtual stores.

Minimal requirements to provide meaningful pricing information

Stickers are not the only potential means of providing information. There are certainly disadvantages. Cost has been mentioned. Accuracy is also a concern. There will be alternatives, but it isn't clear that a good one is available right now. What do we need? I would suggest both of the following:

- ✓ **An easy method a consumer can use on the spot to determine the price, including the price per unit.** Obviously, something that can only be read electronically is a problem. It is not a solution to require carrying the item to a scanner, if only because this might be difficult or impossible for frail persons or person with a disability. The country as a whole is aging and demographic trends in Michigan in particular lead to higher percentages of shoppers with physical challenges. It makes no sense for retailers to turn away a growing percentage of their potential clientele.
- ✓ **Something a consumer can take with her that indicates the price.** This can be at the consumer's option, since not every consumer would always want to take advantage of it. All of us have had an experience of changing our preferences within a store and deciding to buy a replacement or otherwise change our original shopping basket. Having to rely on memory for the price of items in our basket makes this a very difficult task. One way of doing this would be to have peel-off stickers right next to the item or perhaps some sort of print-off mechanism.

I do not know the best ways of accomplishing this and neither do you. What I would suggest is that retailers be able to replace stickers with something else when they can demonstrate that they have satisfied these two requirements. Serendipitously, it could create jobs here if entrepreneurs work on providing successful, cost-effective systems to accomplish this. I understand that someone would have to approve plans that dispense with stickers. This could be delegated to the Attorney General or some other legislative agency.

I urge you to fix these glaring problems before rushing this legislation through. There are other problems with this legislation but it is most important to highlight these particular issues now.